BEFORE THE
DIVISION OF LICENSING
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:	
DONALD KEITH HAYES	OAH No: L2002080358
	MBC No: 20-2002-132888
Respondent	

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted as the Decision and Order by the Division of Licensing of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on July 14, 2003.

ORDERED June 13, 2003.

MEDICAL BOARD OF CALIFORNIA

Mitchell Karlan, M.D., President
Division of Licensing

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: DONALD KEITH HAYES 501 Starfish San Diego, CA 92154 Respondent	Case No. 20 2002 132888 OAH No. L2002080358

PROPOSED DECISION

On December 9 and 10, 2002, in San Diego, California, Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Sanford Feldman, Deputy Attorney General, represented the complainant.

Respondent Donald Keith Hayes was present and was represented by John Mitchell, Esquire.

Evidence was received, the record was closed and the matter was submitted for decision on December 10, 2002. The record was re-opened on February 18, 2003 due to new developments that were relevant to the determination of issues in this case. On February 18, respondent lodged with the administrative law judge documents relating to respondent's criminal conviction. This was marked for identification as respondent's exhibit O and received in evidence without objection. The parties were given the opportunity to further argue in writing about the significance of this new information. The parties declined and the record was closed on March 1, 2003.

FACTUAL FINDINGS

1. The respondent Donald Keith Hayes, M.D., seeks the granting of his certificate as a physician and surgeon.

2. Petitioner received his undergraduate degree from the University of California, San Diego in 1994 and received his medical degree from the University of Hawaii in 1999. He was accepted to and began a family practice residency program at Scripps Memorial Hospital Chula Vista which is administered in conjunction with University of California San Diego Medical School. He completed two of the three years of this program.

3. The issues in this case are simple and straightforward. The facts are not substantially in dispute. However, resolution of the issues in this case is anything but simple and straightforward. Donald Hayes, in early 2000, was on his way to a very satisfactory conclusion to a long journey to become a physician. He was soon to assume the mantle of co-chief resident in his residency program. He was highly valued and respected by his peers. His evaluations during his rotations were excellent. The director of the family practice residency program was very impressed by his professionalism and he was viewed as caring and conscientious.

4. On February 1, 2000, Donald Hayes engaged in conduct while roller blading on a public bike path in Coronado, California which effectively derailed his hopes, dreams and plans. He exposed himself to two women. He was arrested and ultimately pled guilty to a criminal offense. He then proceeded to lie about it. It is hard to imagine a stranger juxtaposition. The evidence in this case about respondent is uniformly positive and rather impressive except for this egregious detour into anti social behavior. When all is said and done, this is a very perplexing picture and one that requires assistance from expert mental health professionals to make any sense of.

5. On or about August 13, 2001, respondent Donald Hayes pled guilty and was convicted of violating Penal Code section 314.1 (indecent exposure) in the San Diego Superior Court, South County Division, in case number S146874. He was sentenced to serve three years summary probation, pay $100 as restitution, serve one day in jail, volunteer 100 community service hours, undergo counseling and register as a sex offender under Penal Code section 290.

6. On or about January 8, 2001, respondent applied to the Board for a license to practice medicine. His application failed to disclose all the pertinent facts and documents surrounding his arrest on February 1, 2000, and included false and misleading statements to the Board. Application question number 22 asked for information concerning any criminal matters against the applicant, and instructed the applicant to provide a "written explanation" and "all official documentation regarding the matter in addition to written explanations." Rather than accurately citing the facts to which he later pled guilty, respondent provided a letter of explanation dated December 4, 2000 which falsely denied the charge of indecent

exposure, claimed the matter was a case of mistaken identity, and falsely portrayed the circumstances under which he was arrested and criminally charged.

7. This is a case in which three mental health professionals testified (two for respondent and one for the Board). Each was qualified to render expert opinion and each was of assistance to the trier of fact. Each, in his own way, attempted to shed light on two crucial questions: Why did it happen and what does it mean?

8. Complainant's position is simple. This is a sex crime. The Board has an obligation to preserve community trust in the medical profession and someone with a lewd conduct conviction should never be allowed to practice medicine. Potential patients should not be exposed to the risk that something like this might happen again and persons needing care might be reluctant to seek it if they knew that their doctor had been convicted of lewd conduct.

Respondent's position is simple. What happened was an aberration in an otherwise normal life and impeccable career. It was situational, had nothing to do with sex and, more importantly, had nothing to do with the practice of medicine. It is a regrettable act but is not substantially related to the duties, functions and qualifications of a physician and surgeon. Furthermore, even if technically there is a substantial relationship, respondent has established a complete picture of rehabilitation and there is no present reason why he should not be allowed to practice his chosen profession.

Both positions are overly simplistic and fail to capture the complexity of the situation. They are far too black and white to deal with the gray that is present. Both contain legitimate points but simultaneously miss the point.

9. The respondent Donald Hayes was born in San Diego, California in 1971. He graduated from high school in Hawaii but returned to California to attend University of California San Diego from 1989 to 1994. After college graduation he did volunteer work at Scripps Hospital. He worked every Sunday for a year in the Intensive Care Unit as a liaison between the Dr. and the patient's family. This experience was the impetus to apply to medical school. From 1995 to 1999, he attended and graduated from the John A. Burns School of Medicine at the University of Hawaii.

10. His medical school was funded by a scholarship from the National Health Service. In exchange for this scholarship, respondent agreed to practice medicine for a period of time (post-residency) in a federally identified under-served area such as the inner city or an Indian reservation. The amount of the scholarship was approximately $120,000. However, if respondent fails to live up to his part of the bargain the scholarship becomes a loan with a huge penalty attached. If he fails to fulfill his obligation he is subject to a treble damage clause that could potentially obligate him to pay $360,000 to the federal government. However, this is not a guaranteed occurrence since he can request that the loan be set aside.

11. His volunteer work at Scripps and his experience during medical school providing care to patients in the Marshall Islands convinced respondent that he wanted to be a family practice physician. He applied for and was selected for one of six positions at the newly opened family practice residency program at Scripps Hospital Chula Vista. He was elated and began his first post graduate year in June 1999. It is clear from the evidence that this first year was a very challenging one for all six new residents. Respondent was the sole male in the group (one of his co-residents testified and referred to him as their "token male.") There were frictions between respondent and the others but they all learned to coexist rather well as the year progressed.

12. For most physicians, residency training is remembered with mixed feelings. It is the advanced training ground that gave them the special expertise in their chosen specialty. It is the first time most feel that they are real doctors. But it is also the time of brutally long hours, short night's sleep, having to make important medical decisions with less experience than one would like and constantly being evaluated. Respondent's experience was typical of that described above. He performed very well but he was stressed and exhausted and filled with self doubt.

13. Respondent's private life was full of difficulty as well. His parents had recently divorced after his father's extramarital affair became public. His mother was distraught and made a suicide attempt. Respondent's wife had recently lost her father to cancer so there were issues of grief and loss as well.

14. On February 1, 2000, respondent found himself with a rare free afternoon. He decided to go roller blading. He passed two women going in the opposite direction while he was roller blading and said hello. They failed to respond and this made respondent angry. Once past them he dropped his sweat pants down around his knees and "mooned" the women who had turned around and saw the respondent. Respondent then turned toward them with his sweat pants down around his knees and exposed his genitalia to them. This was in broad daylight in an area where there were many people enjoying the day. The two women then lost sight of respondent. A short time later they passed respondent who was in the bushes at the side of the bike path. He was completely naked and doing what the women described as either push ups or simulating intercourse. They called the police, identified respondent at a curb-side lineup and respondent was arrested.

15. Respondent retained an attorney to represent him on the charges. He did not tell his lawyer the truth about what had happened. He did not tell his wife about the incident. His attorney began an almost year long series of court motions to get the charges dismissed. This was not successful. Respondent was consumed with shame and guilt. He saw a therapist through the employee assistance program at Scripps. This therapist recommended that respondent see someone more experienced since respondent was in crisis and on the verge of falling apart. Respondent was then referred to Haim Belzer, Ph.D. and later saw psychiatrist Haig Koshkarian, M.D. Initially, he did not tell either of these mental health professionals the truth. He retained a second lawyer who he was not honest with. The second lawyer negotiated the plea that respondent accepted. Not surprising, respondent was

not honest with the medical board in his written communications to them. Only after more than two years of lying did respondent finally begin to admit the true facts. Unfortunately, he was still quibbling with the truth when he was interviewed by David Sheffner, M.D., the Board's expert in this case. This interview took place on October 31, 2002. Respondent ultimately told the truth to Dr. Sheffner after prodding by the doctor. After years of dissembling, respondent has finally told the truth to his wife, his lawyer, his therapist and the court.

16. Respondent has the burden of proof in a Statement of Issues proceeding such as this. Generally, this means that he must show either that (a) charges against him are not true, or (b) the charges are true, but that fact doesn't matter. Respondent has not met his burden in this case. Not only are the charges true but they matter. Respondent committed a crime that is by its nature substantially related to the qualifications, functions and duties of a physician. Even though it did not provide him with sexual gratification, his actions reflect a stunning lack of judgment that calls into question his decision making in other domains. Compounding this was his dishonesty. There are three qualities that are essential in any physician. They are intellect, competence and integrity. Respondent has the first but the latter two are now in doubt. Competence involves the development of a set of skills but also involves the exercise of good judgment. Integrity encompasses a bundle of qualities linked by the common thread of basic honesty even when it is inconvenient.

17. Rehabilitation is not an event but rather a process. The opportunity at a second chance has long and deep roots in our culture and our law. We do not insist that people wear the scarlet letter for a lifetime. But the opportunity at a second chance does not come automatically, simply earned with the passage of time. Rather, we all must earn our second chance. This is the core of the notion of rehabilitation. Society takes it as a given that we all make mistakes, some larger than others. When our mistakes are social mistakes, breaches of the criminal law, for example, society imposes certain disabilities on us. We are penalized for our conduct by incarceration, fines, probation, community service, etc. Implicit in this set of disabilities imposed by society is a deeper truth. Society no longer trusts us completely. We have lost, at least temporarily, the trust of the community that we can do the tasks of citizenship without some oversight, some monitoring. Furthermore, depending on the social breach and depending on one's job, society may say that the breach is such that one can't be trusted to continue working in a particular area. The social breach is inconsistent with the particular type of work one is engaged in.

18. Rehabilitation is a process by which an individual earns back the trust of the community. It is composed of two very different modes of change. The first is attitudinal and involves the demonstration of a change of mind and heart. The second involves changes in behavior. To establish the change of mind and heart, one must come to terms with the underlying criminal behavior. One must demonstrate an awareness and understanding that it was wrong and that it was harmful. One must accept responsibility for the actions, not blaming it on others or excusing it. One must, in a word, show remorse. To establish a change in behavior, one must demonstrate a track record of consistently appropriate behavior

over an extended period of time. In this way, society has the benefit of making a considered judgement with sufficient evidence.

19. There is no specific formula to establish rehabilitation. Each case must be evaluated on its own unique set of factors. Depending on what the stakes are, society may ask for a more compelling demonstration of rehabilitation from some than others. This is particularly so in cases involving licensure of a physician and surgeon. It may be that a simple statement of a person that they have "figured things out" coupled with a testimonial letter from their minister or therapist would satisfy in some settings. But not here.

20. The Medical Board of California is charged with licensing and regulating a type of endeavor that involves profound issues of public protection. Medicine is a healing art that contains within its province the ability to do great good . . . and also great harm. The sick and the infirm come to the healer with a particular type of vulnerability. Their neediness and dependence create a powerful asymmetry of power. They are naked both physically and psychologically before a stranger in the examining room. No one but a physician is given this position by society. For this reason alone, the Medical Board of California must scrupulously evaluate all such claims for licensure with an eye toward their paramount duty of public protection but at the same time acknowledging individual due process rights and the strong public policy in giving deserving people a second chance.

21. The issue here is not whether respondent has sustained a criminal conviction. The conviction is not disputed nor does respondent deny that his behavior was grossly inappropriate. The issue here is not whether respondent lied to the Board during the application process. He has admitted as such and the evidence independently establishes this overwhelmingly. The issue is what is the appropriate action to take consistent with the overriding goal of public protection. Based upon the totality of the circumstances, respondent has failed to establish that he has done the things that are required to obtain a license as a physician and surgeon. This conclusion is reached after full consideration of all evidence of mitigation and extenuation in the record, including the granting of a Penal Code 290 Petition in the Superior Court on or about February 13, 2003. The practical effect of this Order is substantial since it no longer requires respondent's registration as a sex offender. It is a factor in mitigation and does change the picture of respondent's rehabilitative efforts.

22. Part of the difficulty for all concerned in this case stems from the nature of the criminal conviction and the expert opinion presented. We are dealing here with the type of action that might be consistent with a young immature child but not a physician. Indeed, the tenor of respondent's actions are puerile both in dropping his pants in an exaggerated pout and then spending considerable energy and time lying about them because he was so ashamed. This is an immature man who needs to grow up. At the same time, it is clear that he is neither a pedophile nor a sociopath.

23. We are dealing here with conduct that is hard to understand. It is not congruent with all the other information available about respondent. It is inconsistent with the overwhelming evidence in the record of appropriate social and interpersonal behavior by

respondent. In the realm of the mind and behavior (the peculiar realm of the psychiatrist and psychologist) the diagnosis and treatment of mental or psychological or psychiatric conditions is characterized by ambiguity and uncertainty that does not appear in other areas of medicine. Psychiatrists and psychologists are different from other medical specialists because they focus on symptoms or complaints that are found in a person's thoughts, moods, perceptions and behaviors instead of in their skin, bones or muscles. One psychiatrist's diagnosis of insanity can be seen by another psychiatrist as the rational response of a sane person to an insane world. Likewise, one mental health professional can find a mild situational episode of antisocial behavior while, assessing the same conduct, another would diagnose serious psycho-sexual dysfunction. Wrapped up in this wide latitude of diagnoses is the basic fact that psychiatrists and psychologists, unlike other physicians, are asked to attribute meaning to signs and symptoms. An oncologist would not be asked to give normative meaning to the signs and symptoms of cancer. However, a psychiatrist or psychologist is almost always asked this. What does the sign or symptom (typically a thought, feeling or behavior) mean? Mental health professionals are asked almost always to include in their diagnosis and prognosis a domain or category involving personal responsibility and a prediction about future behavior.

24. The fact that diagnosing and treating mental illness is characterized by more ambiguity and uncertainty than other areas of medicine does not make the opinions of mental health professionals any less important or worthy of respect. But it does require a degree of caution on the part of any trier of fact due to the subjectivity of many of the judgments made by mental health professionals. Caution is also required because diagnosis in the realm of the psychiatrist or psychologist involves labeling that often includes stigma. The social conception of a broken arm is far different than the social conception of schizophrenia or pedophilia. The social construction of one with a broken arm is that he or she is injured. The social construction of one with schizophrenia is that he or she is "crazy." The social construction of pedophilia is framed by a view of absolute evil and deviance and an inability to treat effectively to avoid recurrence. This labeling is regrettable but real and it has profound implications for those who are labeled by the mental health profession. Not only does it impact the self-perception of one so labeled. It also has great impact on how others view one so labeled. One of the things that complainant and respondent fought most vigorously over was how Donald Hayes should be characterized or labeled.

25. Despite the challenging nature of diagnosis, prognosis and treatment of those things dealt with by mental health professionals, the mental health profession has tools of assessment and skills of observation and evaluation that are quite acute. Each of the mental health professionals used these tools and skills in reaching the conclusions they reached. The conclusions included: 1) A diagnosis; 2) an implicit characterization of respondent, and; 3) a prediction about the future.

26. Respondent saw Dr. Haim Belzer, a psychologist who has practiced full-time since 1984. He testified that he has a great deal of experience in evaluating and treating sexual molesters. He originally saw respondent in September 2000 and has seen respondent for evaluation and assessment approximately six times, the most recent being July 18, 2002.

His goal was to assess his intellectual functioning, his personality, whether he would be a good candidate for psychotherapy, and whether he could be rehabilitated.

Dr. Belzer is credited with having much expertise in the realm of sexual molestation. He took an in-depth history from respondent over a number of visits and performed a variety of projective and objective psychological tests. His opinion is that respondent does not suffer from any psychosexual disorder nor is respondent a sociopath. He relies heavily for this determination on the fact that respondent has not exhibited either before or after this incident any antisocial tendencies or criminal behavior. He feels strongly that this was an isolated aberrational event brought on by identifiable stressors which interacted with his personality to cause this event. He further opined that respondent's personality is characterized by a very great need to be perceived favorably by others, and that he effectively denied and deceived others and himself in order to protect his own self concept. He felt that respondent should engage in a course of psychotherapy. His opinion at the hearing was that because of the psychological interventions respondent has received so far and the severe consequences that have already attached to his behavior that respondent is a most unlikely candidate for a recurrence of his anti-social behavior.

Dr. Belzer may well be correct in his assessments of respondent. However, the weight to be accorded his opinions is somewhat attenuated by virtue of the fact that respondent was actively lying to him during the time Dr. Belzer was forming many of his opinions.

27. Respondent also saw and was treated by Haig Koshkarian, M.D., a psychiatrist with psychoanalytic training. Dr. Koshkarian has a full-time psychotherapy practice. In addition, he holds teaching positions at both the UCSD Medical School Department of Psychiatry and the San Diego Psychoanalytic Institute. He has been licensed as a physician in California for the last 30 years and is Board Certified in Psychiatry. He has testified often and has expertise regarding exhibitionism. He was credited with expertise in this area.

Dr. Koshkarian first saw respondent in May 2001. He has seen respondent for individual psychotherapy quite often since. His opinion is that respondent's actions were a symptomatic act that was isolated and not part of a pattern that would normally be associated with exhibitionism. He focused in therapy on helping respondent deal with his feelings which included the horrible reality of what he had done to himself. Dr. Koshkarian describes respondent as utterly bewildered and horrified by what he had done and at a loss to understand why stress, anger and frustration expressed themselves the way they did.

Dr. Koshkarian opined that what happened on February 1, 2000 had much to do with issues of personality and difficulty in coming to terms with who he was as a man. He describes respondent as a quiet, shy, almost timid overgrown boy scout who has always been driven to be moral and ethical and tried to do what was right. He likes to cook and do housework. He is sensitive and caring. He has some qualities that would be described as "feminine." As Dr. Koshkarian testified these qualities are not bad things to have in a physician. At the same time, respondent had a great deal of anger and resentment and

confusion over who he was. He kept these bottled up for the most part. Psychotherapy has been devoted to getting in touch with his feelings of anger and frustration and being able to express them. He has come to understand that being caring does not imply a lack of masculinity.

Dr. Koshkarian opined that the prognosis for the future is excellent, that respondent has exhibited insight into his conduct and that it is most unlikely that such behavior will reoccur. Dr. Koshkarian opined that respondent is not an exhibitionist as that term is used in the professional literature (characterized by a chronic pattern and history of exhibitionist acts). Respondent is learning to deal with his moods and is taking Prozac. Dr. Koshkarian testified that respondent has no psychiatric condition that would impact his ability to perform as a physician. While obviously concerned about respondent's dishonesty involving the event in question, he did not believe this was a symptom of a more general tendency toward dishonesty. In fact, based on all available information, respondent's life has shown a marked tendency toward integrity and taking responsibility.

Dr. Koshkarian may well be correct in his assessment of respondent. However, the weight accorded to his opinions is somewhat attenuated by virtue of the fact that respondent was actively lying to him while Dr. Koshkarian was forming some of his opinions.

28. Respondent was also seen and evaluated by David Sheffner, M.D. at the request of the Medical Board. Dr. Sheffner has a specialty in forensic psychiatry and has evaluated health care professionals in similar contexts over the last 20 years. Dr. Sheffner is well respected in the professional community. He was concerned to examine the nature and the ramifications of the behavior that respondent exhibited. He felt respondent may or may not be an exhibitionist but his action was exhibitionist in nature. There is no question that respondent exhibited extremely poor judgment and such conduct, if done in the context of patient care, would be highly distressing and detrimental to patients.

Dr. Sheffner was asked about the significance of the fact that respondent was ordered to register as a sex offender. He opined about whether such a fact would impact patient care. His answers were: "it depends, not necessarily, it could." . . . Rather than being an expression of uncertainty, Dr. Sheffner was expressing the need to focus on what really mattered. Registration as a sex offender is a legal artifact. What matters is not the legal artifact but the nature of the behavior. This is a crucial issue in this case because it is connected to the argument by complainant that there is something inherently disqualifying in perpetuity about respondent's behavior. It relates directly to the issue of informed consent which is triggered by law and ethics in every physician/patient interaction.

It was Dr. Sheffner's opinion that he would need more specifics in order to comfortably draw a conclusion. He felt that if this was a one time incident a number of years ago and respondent had successful psychotherapy, it would not be pertinent to patient care to reveal this to a patient. By the same token, he readily admitted that discovering after an examination that your physician had been convicted of lewd conduct could create a crisis in the treatment relationship.

Dr. Sheffner was asked about opinions predicting future behavior. One of the central questions in this case relates to predictions about reoccurrence. Dr. Sheffner readily admitted that he could not predict with certainty that the behavior would or would not occur again. However, he was asked whether past behavior is the best predictor of future behavior and he felt strongly that this characterization is far too simplistic and general to be of any value in a case like this. It is overly simplistic and general because we know that people learn from their mistakes and experiences. Consumers change their behavior due to increases or decreases in the price of goods. Life provides a vast array of incentives and disincentives for future conduct and most people, most of the time, respond to these.

In this case, we seek to answer the question of future behavior (another way of viewing rehabilitation) as scientifically as possible. Dr. Sheffner identified elements in respondent's experience since February 1, 2000 that are important factors in assessing future conduct. The first and most important is the personal catastrophe of the greatest magnitude that has happened to respondent. This has been a huge negative event in the life of someone who has worked for years and has a great emotional investment in his marriage and career. So, first and foremost, it is because it happened and respondent has spent the last three years dealing with the fallout. The last three years have probably visited more stress and anxiety on respondent than the years leading up to the incident and there has been no reoccurrence.

Dr. Sheffner opined about the issue of dishonesty. It is obvious that this troubles him because it makes evaluating all the rest of the available information just that much more difficult.

Dr. Sheffner prepared a lengthy report dated November 14, 2002 in which he draws certain conclusions that are important to the determination of issues here. Of importance are the following comments:

> "Please note that for men who engage in such exhibitionism, this typically is an expression of feelings of, e.g. impotence/low self-esteem (and in Dr. Hayes' case anger may have been a predominant emotion) and such individuals typically do not progress to more serious (e.g. physically assaultive) behaviors.
>
> Besides the inherent difficulties in predicting future human behavior, inasmuch as all I know about is one incident of exhibitionism, I have no scientific basis for predicting whether or not Dr. Hayes will in the future choose to express his emotions in such an inappropriate manner (and please note that while the existing literature indicates exhibitionism is a paraphilia with a relatively high rate of recidivism, such studies are done on recidivists, and therefore probably don't pertain to the current situation with Dr. Hayes, e.g. one known offense).

In the above paragraph I use the term "choose to engage" because the available data I have indicates that it is reasonable to conclude that such exhibitionist behavior on the part of Dr. Hayes is reasonably within his control and may well be a matter he doesn't wish to repeat, the evidence suggesting such being as follows:

(a) We note Dr. Hayes history of stable and successful functioning in a long and demanding education, and his functioning as a physician (i.e. an individual with intelligence and a demonstrated capacity for good analytical skills/judgment).

(b) We note his depression/anxiety/remorse subsequent to his experiencing the catastrophic consequences of his behavior on his professional career and his marriage (and this would include his having sought out/established a decent relationship with an accomplished psychotherapist, Dr. Koshkarian, i.e. even though he hadn't told Dr. Koshkarian the whole truth of what he did and still manifests deficits in insight as to why he chose to express his emotions in the way he did, he does have the capacity to work honestly with Dr. Koshkarian regarding these issues, if he so chooses).

(c) We note his functioning/psychiatric history is one not characterized by problems with impulse control, obsessive compulsive disorder, a pattern of self-destructive behaviors or the use of sexually related behaviors to alleviate anxiety, and we note his attempts to make other (e.g. educational) reparative/constructive efforts in his life since not being able to practice medicine.

(d) There is the distinct possibility (although this can't be definitively proven, one way or the other) that his exhibitionist may have been an isolated event i.e. we have no demonstrated history of chronic exhibitionism."

29. Rehabilitation and likelihood of reoccurrence are simply two sides of the same coin. They are merely different ways of looking at the same issue. That issue, properly framed, is whether the public welfare and safety would be compromised by the issuance of a certificate to practice medicine to respondent Donald Hayes. The answer is, for now, yes. There is insufficient evidence of a convincing nature to justify the issuance of a license at this time. Respondent has only recently come to terms with the reality of his actions. He has been lying to himself and others about this for quite some time. The weight of the evidence supports the conclusion that he was so ashamed and repulsed by his conduct that he could not bring himself to admit to it. But even if this is the case, it represents a most serious concern about how he would handle future incidents that might cause him embarrassment or shame.

30. Respondent has gone through hell for the last three years. There is no question that he has suffered greatly, and lost much as a result of his lack of judgment three years ago. However, respondent is the architect of the house he lives in and we do a great disservice to truth when we spend too much time trying to analyze the motivations behind otherwise incomprehensible conduct. When the dust clears in this case what remains is an incredibly

incredibly immature and embarrassing act and a failure to take responsibility for it. That is the simple, unavoidable and inescapable conclusion. In terms of the future of Dr. Hayes, the prognosis is guarded. The prognosis is also, uniquely, within the control of Dr. Hayes. Accepting responsibility, telling the truth and engaging in consistently appropriate conduct are all within his power to do. It will require a great deal of courage because he has so greatly disappointed so many people. But he seems to have begun this rehabilitative journey and will hopefully continue.

LEGAL CONCLUSIONS

1. Business and Professions Code section 2221(a) provides:

> "The Division of Licensing may deny a physician's and surgeon's license to any applicant guilty of unprofessional conduct or of any cause that would subject a licensee to revocation or suspension of his or her license; or, the division in its sole discretion, may issue a probationary license to an applicant subject to various terms and conditions outlined in this section."

2. Business and Professions Code section 480(a) provides that the Board may deny a license on the grounds that the applicant has done one of the following:

> "(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.
>
> (2) Does any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another, or
>
> (3) Done any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.
>
> The Board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which applications is made.
>
> . . .
>
> (c) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application fur such license."

3. Business and Professions Code section 490 provides in relevant part that:

"A board may suspend or revoke a license on the grounds that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provision of Section 1203.4 of the Penal Code."

4. Business and Professions Code section 493 states:

"Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, or duties of the licensee in question."

5. Business and Professions Code section 498 states:

"A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license by fraud, deceit, or knowing misrepresentation of a material fact or by knowingly omitting to state a material fact."

6. Business and Professions Code section 2234 authorizes action against any licensee charged with unprofessional conduct. Under section 2234, unprofessional conduct includes, but is not limited to:

"(a) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provisions of this chapter [Chapter 5, the Medical Practice Act].

. . .

(e) The commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and surgeon.

(f) Any action or conduct which would have warranted the denial of a certificate."

7. Business and Professions Code section 2236 provides that conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct and is grounds for discipline. Under section 2236, the division may inquire into the circumstances surrounding the commission of a crime in order to fix the degree of discipline or to determine if the conviction is of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon. In addition, a plea of guilty is deemed to be a conviction, and the record of conviction "shall be conclusive evidence of the fact that the conviction occurred."

8. Business and Professions Code section 2261 provides that "[k]nowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine . . . which falsely represents the existence or nonexistence of state of facts, constitutes unprofessional conduct."

9. Cause exists to deny respondent's application for licensure by virtue of Factual Findings 1-30. These findings establish that denial is appropriate at this time under Business and Professions Code sections 2234, 480(a) and (c), 490, 493, 498, 2234, 2236(a) and 2261.

ORDER

The Petition for Licensure as a Physician and Surgeon Donald Keith Hayes, M.D. is denied.

DATED: 5/16/03

STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings